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No. 84-1273

In the Supreme Court of the United States

OCTOBER TERM, 1984

REGENTS OF THE UNIVERSITY OF MICHIGAN,
PETITIONER

v.

SCOTT E. EWING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The United States will address the following question:

Whether a state medical school's decision to dismiss an academically deficient student is subject to substantive due process review under 42 U.S.C. 1983.

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INTEREST OF THE UNITED STATES

Respondent is a former student at the University of Michigan Medical School who alleges that his dismissal for substandard academic performance violated substantive due process guarantees. The United States has a strong interest in promoting excellence in medical education and in ensuring that due process claims are correctly analyzed.

Congress has declared it "the responsibility of the Federal Government, consistent with the rights, duties,

and privileges of States and institutions of higher education, to promote * * * [the] quality of postsecondary education, including the maintenance and extension of academic freedom, responsibility, and educational diversity." Higher Education Act of 1965, 20 U.S.C. 1001(2)(C). Moreover, Congress has appropriated for fiscal year 1985 approximately $200 million for a variety of health professions grants, including institutional aid and scholarships, under the Public Health Service Act, 42 U.S.C. 201 *et seq.*, to be awarded by the Department of Health and Human Services. That Department will also insure approximately $250 million in student loans during fiscal year 1985 under the Health Education Assistance Loan program. The United States therefore has a substantial interest in the quality of medical education.

Because the federal government, like the states, is bound to observe the requirements of the Due Process Clause, the United States also has an interest in properly defining the scope of due process review. The approach adopted by the court of appeals in this case, particularly its finding of a property interest based solely on ambiguous implied understandings, could greatly expand the instances in which federal decisions are subjected to constitutional scrutiny.

STATEMENT

1. In the fall of 1975, respondent entered a special six-year program at the University of Michigan, leading to an undergraduate degree and a medical degree. Almost immediately, respondent experienced academic difficulties, taking incompletes in two courses his first semester. After experiencing other academic problems during his first year, respondent took a leave of absence for a semester. When he returned, respondent again had academic troubles, taking incompletes in some courses and receiving a failing grade in another. Respondent was placed on academic probation and advised in writing that any further deficiencies would be grounds for dismissal. He subsequently received a deficient grade in a pharmacology course, but he was permitted to take the examination again. Pet. App. 12a-14a.

Six years after admission to the joint degree program, respondent completed the four years of course work required for entry into the two-year clinical phase of the program. Before starting the clinical phase, respondent, like other medical school students, was required to pass Part I of the National Board of Medical Examiners (NBME) test, a two-day multiple choice examination. Respondent not only failed the NBME, he received the lowest score ever recorded by a University of Michigan student. Pet. App. 15a.

The medical school's Promotion and Review Board then voted unanimously to dismiss respondent from the program.[1] Respondent requested reconsideration, and the Board held a hearing. Respondent argued that his poor performance on the NBME should be excused for a number of personal reasons.[2] Respond-

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[1] Promotion and Review Boards determine whether students may advance from one year of study to the next and recommend whether students should graduate. DX36, at 34.

[2] Respondent told the Board that his mother had suffered a heart attack 18 months before the examination; he had broken up with his long-time girlfriend about six months before the examination; he had devoted too much time to writing a paper for an essay contest; he had had to retake the examination in the pharmacology course just before the NBME; and he had panicked during the NBME. Pet. App. 18a-19a.

ent was asked whether he had understood the letter he had received advising him that he was on probation and might be dismissed for further deficiencies. He responded that he had understood the warning, and added that the pressure resulting from being "under the gun" may have contributed to his poor performance on the NBME. The Board again voted unanimously to dismiss him. Pet. App. 17a-20a.

Respondent appealed the Board's decision to the medical school's Executive Committee, requesting a leave of absence so that he could study for and retake the NBME. After meeting with respondent, the Committee unanimously affirmed his dismissal. Pet. App. 15a.

2. Respondent then filed suit in the United States District Court for the Eastern District of Michigan under 42 U.S.C. 1983, seeking injunctive relief and damages.[3] He also alleged state law breach of contract and promissory estoppel claims. Respondent alleged, in his Section 1983 claim, that he had a property interest in his status as a medical school student.[4] Respondent did not claim that he had been deprived of this property interest without procedural

[3] The University moved to dismiss the damages claim on the ground that it was barred by the Eleventh Amendment, and the district court granted that motion. Pet. App. 4a-11a. Respondent did not appeal the dismissal of his damages claim. *Id.* at 29a n.1.

[4] Respondent's complaint alleged that he had "a property right and interest in his continued enrollment * * * created, at least in part, by the Medical School's guidelines, policy and practice * * * that any medical student would be entitled to, at least, one retest of the NBME" (J.A. 15-16). Respondent did not allege that he had been deprived of a liberty interest.

due process. Rather, respondent contended that he had been denied substantive due process because he was not permitted to retake the NBME even though the University had permitted each of the other 40 students who had failed the test between 1975 and 1982 to take it again (J.A. 15-16).

Following discovery and a four-day bench trial, the district court ruled against respondent on all counts (Pet. App. 12a-27a). The district court noted that this Court, in *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78 (1978), had left open the question "whether courts can review academic qualification decisions on substantive due process grounds" (Pet. App. 21a).[5] The district court reviewed the post-*Horowitz* cases and concluded that academic dismissals are subject to substantive due process review, but that such review is limited to "whether the decision was based on arbitrary or

[5] In *Horowitz* the Court considered a claim that a student had been denied procedural and substantive due process when she was dismissed from medical school (435 U.S. at 82-91). In assessing the procedural due process claim, the Court found no need to determine whether the student had been deprived of a liberty or property interest because it was clear that her dismissal had been accompanied by fair procedures (*id.* at 84-85).

The Court then addressed the student's substantive due process claim, which rested on her allegation that she had been dismissed in part on account of her sex, religion, and physical appearance (435 U.S. at 92 n.7). It noted that a number of lower courts had assumed that a substantive due process inquiry was appropriate if a plaintiff alleged that, despite procedural fairness, an academic dismissal had been arbitrary and capricious, or lacked a rational basis (*id.* at 91-92). The Court did not have to decide whether that approach was correct, since it concluded that the student in *Horowitz* had not been dismissed arbitrarily (*id.* at 92).

capricious factors which are not reasonably considered to be academic criteria" (Pet. App. 25a). Relying on the Court's admonition in *Horowitz* that judges are "ill-equipped to evaluate academic performance" (435 U.S. at 92), the district court concluded that it should not inquire into the merits of the academic decision itself, but should instead afford the University "the traditional broad range of autonomy" given to academic institutions (Pet. App. 26a). Since respondent did not allege that his dismissal "was based on bad faith, ill will or other impermissible ulterior motives" (*ibid.*), the court dismissed the substantive due process claim brought under Section 1983.

The district court also dismissed respondent's breach of contract and promissory estoppel claims. It concluded that the University's statement in a promotional pamphlet that a qualified student who failed the NBME would be permitted to retake the examination, and the fact that other students had been permitted to retake the NBME, did not amount to an unqualified promise to respondent or give him a contract right to retake the test. The court found in this regard that respondent had not seen the pamphlet that allegedly gave rise to the contract right to retake the NBME. Pet. App. 26a-27a.

3. The court of appeals reversed (Pet. App. 28a-33a). It first addressed the question whether respondent had been "deprived of a constitutionally cognizable right" (*id.* at 30a). The court noted that in *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972), this Court held that property interests protected by due process are "defined by existing rules or understandings that stem from an independent source such as state law," and that in a companion

case, *Perry* v. *Sindermann*, 408 U.S. 593, 601-602 (1972), the Court held that "agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances' " could be independent sources of property interests. The court of appeals also noted that the Michigan Supreme Court had once stated that two medical school students had "a right * * * resting in contract to be continued as students" (*Booker* v. *Grand Rapids Medical College*, 156 Mich. 95, 100, 120 N.W. 589, 591 (1909)). Relying on these cases, the court of appeals concluded that "an implied understanding that a student shall not be arbitrarily dismissed from his university is a property interest, resting in the contractual relationship between the parties, which can give rise to constitutional protections" (Pet. App. 30a-31a).

The court of appeals next considered whether substantive due process review is applicable in cases involving the deprivation of such a right. Relying on *Stevens* v. *Hunt*, 646 F.2d 1168, 1170 (6th Cir. 1981), a post-*Horowitz* decision, the court held that, in an academic dismissal case, "the arbitrary and capricious deprivation of a constitutionally cognizable right does state a valid [cause] of action" under the Due Process Clause (Pet. App. 32a).

Finally, the court of appeals concluded that the University acted "in an arbitrary and capricious manner by not allowing [respondent] a second opportunity" to take the NBME (Pet. App. 33a). In the court of appeals' view, the district court's finding that respondent did not have a contract or promissory estoppel right under state law to retake the NBME was "clearly erroneous" (*id.* at 32a-33a). The court of appeals recognized that the University's Medical School Bulletin was the primary source of any con-

tract terms between the University and respondent, and that the Bulletin grants "broad discretionary power" to Promotion and Review Boards (*id.* at 32a). But the court stated that the terms of the contract were defined not solely by the Bulletin, but also by the statement in a "promotional pamphlet * * * that a qualified student would be given a second chance to take the NBME" and by the "consistent practice of the medical school" of allowing students who failed the NBME to retake the examination (*id.* at 33a).[6] Accordingly, the court of appeals ordered the University to allow respondent to retake the NBME and to reinstate him as a medical student if he passed it (*ibid.*).

SUMMARY OF ARGUMENT

The court of appeals plainly erred in ruling that the Due Process Clause required the University of Michigan Medical School to permit respondent to retake an examination. Respondent's substantive due process claim amounts to nothing more than a claim that the University breached its contract with him. It is wholly inappropriate for federal courts to decide purely contractual disputes under the rubric of substantive due process. Moreover, even if property interests based on contract claims may on occasion give rise to substantive due process review, respondent has not shown that he was deprived of a property interest. Finally, even if respondent had a property interest in his continued status as a medical student,

[6] Although the court of appeals found that the district court's conclusions regarding respondent's contract and promissory estoppel claims were clearly erroneous, it expressly stated that it was not granting relief on the basis of those claims because "this case can be disposed of on the Section 1983 claim" (Pet. App. 30a n.2).

the University complied with due process in ordering respondent's dismissal. It is undisputed that respondent was given notice and an opportunity for a hearing prior to his dismissal and that he was dismissed solely for academic reasons; the district court correctly concluded that it is not the role of the federal courts to second-guess such academic determinations.

ARGUMENT

RESPONDENT'S DISMISSAL FROM MEDICAL SCHOOL FOR ACADEMIC DEFICIENCIES DID NOT VIOLATE SUBSTANTIVE DUE PROCESS GUARANTEES

A. Respondent Was Not Deprived Of An Interest Warranting Substantive Due Process Review

Before discussing the question whether the University acted arbitrarily and capriciously in dismissing respondent from medical school for substandard academic performance, we wish to note two aspects of the court of appeals' decision that, while perhaps not expressly challenged by petitioner, seem erroneous. First, we question whether it is appropriate to allow respondent to turn what is essentially a state common law claim that the University breached its contract into a federal constitutional claim that the University, by breaching the contract, deprived respondent of property without substantive due process. Second, even if respondent's grievance properly falls within 42 U.S.C. 1983, we question whether the court below correctly concluded that he had a property interest in his continued attendance at the medical school on the basis of implied understandings and vague language in school promotional pamphlets.

1. Property interests, the deprivation of which requires procedural protections consistent with the Due

Process Clause, are not created by the Constitution, but are instead derived from independent sources such as state law. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Substantive due process rights, in contrast, are created by the Constitution. Respondent contends in essence that he had a contract with the University containing an implied term permitting him to retake the NBME if he failed, and that the University breached this contract by dismissing him rather than permitting him to retake the examination. Apart from this essentially state law claim, he does not allege the violation of any constitutional right. Because no provision of the Bill of Rights protects against breaches of contract, we seriously doubt whether substantive due process provides an appropriate basis for a claim in this case.

The Seventh Circuit recently recognized this point in *Brown* v. *Brienen*, 722 F.2d 360 (1983). The plaintiffs were public employees who alleged that their contract right to compensatory time off had been breached. After rejecting the plaintiffs' procedural due process claim, the court turned to their charge of a substantive due process violation. It stated that " '[s]ubstantive due process' is a shorthand for the fact that the Supreme Court has interpreted the due process clause of the Fourteenth Amendment to confer certain substantive rights based mainly on the Bill of Rights," adding that "there is nothing in the Bill of Rights about protecting contractual rights as such" (*id.* at 366-367). Accordingly, the Seventh Circuit summarily dismissed plaintiffs' substantive due process claim.[7]

[7] The court added: "[W]e express no view of the merits of their contract claims, which they are free to pursue in state court" (722 F.2d at 367).

Besides conforming to the teachings of this Court's substantive due process cases, this approach is quite sensible. At bottom, all that respondent has alleged is a breach of contract. The court of appeals acknowledged as much by holding, as part of its substantive due process analysis, that the district court's rejection of respondent's state law contract and promissory estoppel claims was "clearly erroneous" (Pet. App. 33a). The court of appeals then went on to conclude that the University's breach was "arbitrary and capricious" (*ibid.*), but this conclusion adds nothing analytically—and was not intended to add anything—to the simple holding that, in the court of appeals' view, respondent's contract claim was well founded.

It makes little sense to "constitutionalize" breach of contract disputes in this manner. Cf. *Paul* v. *Davis*, 424 U.S. 693, 701 (1976) (refusing to "make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States"); *Parratt* v. *Taylor*, 451 U.S. 527, 544 (1981) (same). If respondent and the University in fact had a contract with an implied term permitting him to retake the NBME, then the University breached that contract, and respondent should prevail in a suit for breach of contract in state court. On the other hand, if respondent cannot prevail in a breach of contract action, then there is no basis for concluding as a matter of federal constitutional law that the University arbitrarily and capriciously denied him permission to retake the NBME. There is, in short, no warrant for federal courts to decide breach of contract claims in the guise of sub-

stantive due process analysis.[8] Indeed, it is especially inappropriate for federal courts to instruct arms of state governments to abide by state contract law, where, in reality, there is no independent claim of infringement of a federally-protected right. Cf. *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984).[9]

2. Respondent's claim also lacks merit because he has not shown that he was deprived of a property interest.[10] For respondent's claimed interest in his student status to fall within the protections of the Due Process Clause, respondent must show that he had "a legitimate claim of entitlement to" that status and not simply a "unilateral expectation" or an "abstract need or desire" to be allowed to pursue his

[8] While we do not believe that breach of contract claims should be subject to substantive due process review, rights created by contract—if they amount to a "property" interest—are of course subject to procedural due process protections. See, *e.g.*, *Board of Regents* v. *Roth*, *supra*; *Perry* v. *Sindermann*, 408 U.S. 593 (1972). Respondent does not contend that his procedural rights were violated by his dismissal from medical school. See Pet. 15 n.15.

[9] This would be a different case if respondent alleged that he was deprived of a property interest, derived from a contract, because he had exercised a right protected by the Constitution. In such a case substantive due process review would be warranted.

[10] This Court has found property rights in diverse interests such as retention of government employment (see, *e.g.*, *Cleveland Board of Education* v. *Loudermill*, No. 83-1362 (Mar. 19, 1985)), receipt of government benefits (see, *e.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970)), and attendance at public school (*Goss* v. *Lopez*, 419 U.S. 565 (1975)). Nonetheless, "the range of interests protected by procedural due process is not infinite." *Roth*, 408 U.S. at 570; *Ingraham* v. *Wright*, 430 U.S. 651, 672 (1977).

medical studies, derived from a source such as state law. *Roth*, 408 U.S. at 577.[11]

There is no suggestion that any Michigan statute or regulation grants medical students the equivalent of "tenure." Rather, the applicable source of state law here would appear to be the University's Medical School Bulletin, which clearly states that Promotion and Review Boards have full authority to decide whether a student may advance from one year to the next (DX36, at 34). The Bulletin does not provide that dismissals may only be made for cause or that any particular level of academic deficiency must be demonstrated. To the contrary, the Bulletin states that "Promotion Boards can, *at their discretion*, approve advancement, require the student to repeat all or part of a year's work, refuse further registration, or take whatever action they may deem appropriate

[11] The court of appeals did not define its inquiry as directed to whether respondent had a property interest in his status as a medical school student. Rather, it held only that "an implied understanding that a student shall not be arbitrarily dismissed from his university is a property interest, resting in the contractual relationship between the parties, which can give rise to constitutional protections" (Pet. App. 31a). This confusing statement appears to result from a misreading of *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78 (1978). The court of appeals merged the protected interest analysis—which relates to whether the Due Process Clause is *implicated*—with the arbitrary and capricious analysis—which relates to whether the Due Process Clause is *violated*—in order to reach its conclusion that respondent possessed a "property interest" in "not be[ing] arbitrarily dismissed." In short, the court seems to have held that respondent had a "property" interest in not being discharged from medical school without being allowed to retake an examination. This is a different sort of "property" interest than this Court has previously identified.

in an individual instance" (*ibid.* (emphasis added)).[12] The Bulletin, "having no definitions, no criteria, and no mandated 'shalls,' creates no analogous duty or constitutional entitlement." *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458, 466 (1981). Under the terms of the Bulletin, therefore, medical school students at the University of Michigan are analogous to employees whose jobs are terminable at will, as in *Board of Regents* v. *Roth*, *supra*, and *Bishop* v. *Wood*, 426 U.S. 341 (1976), rather than employees with "common law" tenure rights, as in *Perry* v. *Sindermann*, 408 U.S. 593 (1972). Hence, respondent has not shown that he possessed a property interest in his status as a student.[13]

The court of appeals gave short shrift to the actual language of the Medical School Bulletin. It instead concluded that the terms set forth in the Bulletin were modified by a medical school promotional pamphlet and by an alleged practice of permitting failing students to retake the NBME (Pet. App. 32a-33a). But the statement in the pamphlet is clearly insufficient to modify the unambiguous terms described in

[12] The Bulletin also provides (DX36, at 34) that a student may ask a Board to reconsider its decision and may appeal that decision to the Executive Committee, as respondent did. The fact that the University permits students to question the discretionary decision of Promotion Boards through the procedures described in the Bulletin does not create a property interest. *Olim* v. *Wakinekona*, 461 U.S. 238, 249-250 (1983).

[13] This Court found that the students suspended in *Goss* v. *Lopez*, *supra*, had been deprived of property interests. But those property interests were firmly based on an Ohio statute providing a right to a free, public education to Ohio school children, as the Court repeatedly emphasized (419 U.S. at 567, 573-574). Respondent has pointed to no Michigan statute providing a right to a medical education.

the Bulletin.[14] Likewise, the medical school's decisions to permit other students to retake the NBME did not establish a "common law" right of every flunked student to take the examination a second time, regardless of other circumstances. See *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. at 465.[15]

[14] The pamphlet (excerpted at J.A. 113-114) appears to have been designed to reduce the fears of potential applicants about the stresses of medical education. For example, the page after the article relied upon by respondent asks: "Can medical school spoil your fun?" (PX3, at 31). The article relied upon by respondent is a report of an interview with an assistant dean who claimed that the faculty had done away with "rites of passage" and the "basic training" mentality of medical education (*id.* at 30). It is in that context that the pamphlet quotes the assistant dean as saying that "everything possible is done to keep qualified medical students in the Medical School," which "even extends" to retaking the National Boards (*ibid.*). The district court expressly found (Pet. App. 26a-27a) that respondent had not learned of the pamphlet's contents before taking the NBME. Even if he had, we doubt that he reasonably could have believed that its contents were implied contract terms.

[15] In *Perry* v. *Sindermann*, *supra*, the Court held that the respondent, a teacher at a university with no formal tenure system, could attempt to prove that he had "*de facto* tenure" resulting from an implied contract and a "common law" practice (408 U.S. at 599-603). In *Perry*, however, the respondent pointed to his college's official Faculty Guide, which stated that "[t]he Administration of the College wishes the faculty member to feel that he has permanent tenure" (*id.* at 600). In addition, official guidelines provided that the respondent could be dismissed only for cause (*id.* at 600-601 & n.6). In this case, respondent can point to no such statements establishing an implied right to continued enrollment at the medical school. We note, moreover, that the court of appeals did not mention the fact that 19 students were dismissed

Since resolution of this issue requires factual analysis, and since other grounds for reversal are plainly available, the Court need not reach the question whether respondent had a property interest in continued enrollment at the medical school. See also Pet. 20. As in *Horowitz* (435 U.S. at 84-85), the Court may assume the existence of a protected interest for purposes of considering whether the University's deprivation of that interest violated due process. It is to that question we now turn.

B. Respondent's Dismissal From Medical School For Academic Reasons Was Not Arbitrary Or Capricious

The court of appeals clearly erred in concluding that the University acted arbitrarily and capriciously in dismissing respondent from medical school. Respondent's unimpressive academic record speaks for itself. As noted above, his school history was marked by a consistent pattern of withdrawals, warnings, incompletes, and course and examination failures. Nor is there any question that respondent received all the process due him. He was advised in writing that he was on probation and might be dismissed. After his dismal performance on the NBME, respondent was permitted to present his case to the Promotion and Review Board and to appeal its decision to the Executive Committee. Indeed, respondent makes no claim that he was denied procedural due process.

The court of appeals instead found that respondent had been denied substantive due process. Specifically, the court found that "the University treated [respondent] in an arbitrary and capricious manner by not allowing him a second opportunity to take Part I of the NBME" (Pet. App. 33a). This decision was arbitrary because "[respondent] was a 'qualified' student" and because "it was the consistent practice of the University * * * to allow a qualified medical student who initially failed the NBME Part I an opportunity for a retest" (*ibid.*).

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from respondent's program between 1975 and 1982 without being permitted to take the NBME (J.A. 165-166)—a fact that undermines any assertion that there was a "common law" right to retake the test.

Even accepted on its own terms, the court of appeals' ruling (which sounds more in equal protection than substantive due process) is indefensible. In focusing narrowly on the fact that all 40 other students who failed the NBME between 1975 and 1982 were permitted to retake the examination, the court of appeals overlooked the fact that 19 students had been dismissed from respondent's program during that period without being permitted to take the NBME (J.A. 165-166). Furthermore, only one other student in respondent's program failed the NBME while on probation. That other student's excuse for his poor performance—he suffered an epileptic seizure during the examination (Reed Dep. at 168-169)—is clearly more substantial (or, at least, of a far different nature) than respondent's excuses (see note 2, *supra*). In short, there was nothing unfair, much less arbitrary and capricious, about respondent's dismissal.

But there is a far more fundamental flaw in the court of appeals' substantive due process analysis. A federal court simply has no warrant, in the guise of substantive due process review, to second-guess the good-faith academic decisions of university faculty and administrators. Instead, we agree generally with the district court's conclusion that academic dismissals should be reviewable, at most, "only * * * to scrutinize the objective factors which may have tainted or otherwise affected the decision, and not the

propriety of the decision itself" (Pet. App. 25a).[16] Thus, if a dismissed student had some plausible support for a claim that his dismissal was actually based on "impermissible ulterior motives" (*id.* at 26a), a court could consider whether the student's academic record warranted dismissal or whether, in fact, the academic reasons were pretextual. Cf. *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567 (1978). Here, however, respondent has not even alleged a non-academic reason for his dismissal. As the district court found (Pet. App. 26a), "[t]here have been no allegations offered to the effect that [the University's] decision was based on bad faith, ill will or other impermissible ulterior motives. The evidence demonstrates that the decision to dismiss [respondent] was reached in a fair and impartial manner, and only after careful and deliberate consideration. * * * [T]he [University] had good reason to dismiss [respondent] from the program."

This approach is fully consistent with this Court's decision in *Horowitz*. The Court there noted that a "graduate or professional school is * * * the best judge of its students' academic performance and their ability to master the required curriculum" (435 U.S. at 85-86 n.2). In contrast, "[c]ourts are particularly ill-equipped to evaluate academic performance" (*id.* at 92). For that reason, the Court

[16] In practice, the differences between our primary contention—that substantive due process review is warranted only where a plaintiff alleges that his dismissal infringed rights protected by the Constitution—and the district court's position—that academic dismissals should be reviewed by the courts only where a plaintiff alleges that the dismissal was actually motivated by non-academic factors—are slight. Only where a plaintiff alleges that his dismissal was motivated by an arbitrary, non-academic reason not related to the plaintiff's fundamental rights would the results vary.

warned against "judicial intrusion into academic decisionmaking" (*ibid.*). This admonition is especially appropriate in a case involving a medical school, where technical issues may well be involved in evaluating a student's competence. See *Hines* v. *Rinker*, 667 F.2d 699, 704 (8th Cir. 1981).

The federal courts have long recognized that they should not review academic decisions. As the court stated in *Connelly* v. *University of Vermont*, 244 F. Supp. 156, 160 (D. Vt. 1965), after analyzing the prior cases:

> The effect of these decisions is to give the school authorities absolute discretion in determining whether a student has been delinquent in his studies, and to place the burden on the student of showing that his dismissal was motivated by arbitrariness, capriciousness or bad faith. The reason for this rule is that in matters of scholarship, the school authorities are uniquely qualified by training and experience to judge the qualifications of a student, and efficiency of instruction depends in no small degree upon the school faculty's freedom from interference from other noneducational tribunals.

We agree with these sentiments, and with petitioner and amici, that intrusive judicial review of academic decisions would be counter-productive. Society's interests—in producing qualified doctors, or engineers, or English teachers—would best be served by leaving academic decisions to academic experts.

Finally, we note that this litigation, ostensibly involving only a mundane claim of breach of contract, in fact threatens the University's interest in academic freedom. This Court has recognized that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First

Amendment" (*Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967)). See also *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.); *Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result). Discretion to decide, on the basis of academic factors, which students should advance and which students should be dismissed is surely a judgment that is central to the interests protected by academic freedom. Cf. *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) ("The freedom of a university to make its own judgments as to education includes the selection of its student body."). It would be ironic indeed if these vital constitutional interests were to be sacrificed in the name of substantive due process review, which is designed to protect against violations of the Bill of Rights.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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* Acting Solicitor General Fried is disqualified in this case.

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